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CHARLES ELMO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 423.

LEVERING & GARRIGUES COMPANY, HEDDEN IRON CONSTRUCTION COMPANY, McCLINTIC-MARSHALL COMPANY, *et al.*,

Petitioners,

v.

PAUL J. MORRIN, individually and as President of International Association of Bridge, Structural and Ornamental Iron Workers, *et al.*,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION.

FRANK P. WALSH,
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INDEX.

PAGE

STATEMENT OF CASE 1

POINT I.

The mere assertion by plaintiffs-appellants of a claim for relief upon a Federal ground which has been determined adversely does not give jurisdiction to the District Court to pass upon questions of which it would have no jurisdiction except for the claim based on Federal Constitution or Statute 7

POINT II.

Irrespective of the determination of the questions raised under Point I, there are other considerations inseparably related to the question raised thereunder, which lead to the same determination made by the Circuit Court of Appeals in connection therewith and on account of which its said decree should not be disturbed 14

CONCLUSION.

It is respectfully submitted that the Circuit Court of Appeals for the Second Circuit did not err in holding that the District Court had no jurisdiction to make the decree which it did, and that the decree of the United States Circuit Court should be affirmed 18

Table of Cases.

	PAGE
Elgin Watch Co. v. *Illinois Watch Co.*, 179 U. S. 665, 667	8
General Investment Co. v. *Lake Shore, etc., Railway Co.*, 260 U. S. 261	9, 10, 12
Leschen Rope Co. v. *Broderick*, 201 U. S. 166	8
Minnesota v. *Northern Security Co.*, 194 U. S. 48, 24 S. Ct. Rep. 598, 48 L. Ed. 870	12, 14
Noyes v. *Parsons*, 245 Fed., page 264	12
Siler v. *Louisville & Nashville Railroad Co.*, 213 U. S. 175	8
Vogue Co. v. *Vogue Hat Co.*, 12 Fed. (2nd Series) 991, C. C. A. 6	9

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Statement of Case.

Prior to July 24, 1924, and likewise prior to the 11th day of March, 1925, the date upon which this action was commenced in the United States District Court for the Southern District of New York, an action was started in the Supreme Court of the State of New York, New York County, by a group of plaintiffs numbering fourteen, which

included the petitioners in the present action, seeking, among other things, a preliminary injunction restraining the defendants from certain acts. Their application was denied by Mr. Justice Lydon on the 24th day of July, 1924.

The defendants in the action brought in the State Court were almost identical with the respondents in the present action.

The parties plaintiffs in the State action and the petitioners in the present action were at that time all members of the Iron League of New York and, as such, in point of interest, were vitally concerned with the results of both actions (See defendants' answer, paragraph 29, p. 36, Transcript of Record).

The issues raised were, in substance, identical in both actions and predicated upon the same controversy, namely, disputes connected with the operations in the same industry, in the same city and locality, involving on the part of the plaintiffs-petitioners in both actions the same ultimate purpose.

The only variation between the complaints filed in the State Court and the Federal Court was the additional allegations of boycott in the complaint filed in the Federal Court being a necessary allegation upon which to invoke jurisdiction for the alleged violation of the Anti-Trust Laws (see defendants' answer, paragraph 30, pp. 36, 37, 38, 39, 40 and 41, Transcript of Record).

The complaint filed in the Federal Court invoked jurisdiction on three grounds:

1. Diversity of citizenship;
2. Interference with interstate commerce; and
3. Alleged violation of constitutional rights.

The second and third allegations of jurisdictional facts were denied in paragraphs 19 and 21 of defendants' answer (pp. 31, 32, Transcript of Record), and the good faith of the entire proceeding challenged in paragraphs 23 to 30 inclusive of defendants' answer (pp. 33 to 40 inclusive, Transcript of Record).

Upon the filing of the bill of complaint in the present action a temporary order of injunction was entered restraining respondents from performing the acts complained of pending a final hearing.

Subsequently, and by consent, an order of reference was made to a Master, who after hearing the testimony, which was offered only by the plaintiffs-petitioners herein, found that petitioners *were not entitled* to relief under the Anti-Trust Laws, but recommended a Decree for injunction on the alleged violation of those rights of petitioners, which were purely local in character and dependent upon diversity of citizenship for jurisdiction.

As there was no testimony offered by respondents to controvert the evidence offered on the part of petitioners to sustain their claim of a violation of interstate commerce, the effect of the Referee's ruling, taking the evidence as offered to be admitted, in substance, was that there had never been substantial or colorful basis for the allegation in the complaint that defendants-respondents had violated the Anti-Trust Laws.

Of his ruling on denying petitioners' claim for relief under the Anti-Trust Laws, the Referee, in his report and decision, held:

> "Plaintiffs' contention that the conduct of defendants constitutes an unlawful interference with interstate commerce is based upon the fact that in

some cases sub-contracts include the fabrication in other states of steel to be shipped into and erected in New York. It is insisted that such contracts are interstate in character because contemplating the interstate shipment of steel in their performance, and that the erection of the steel so shipped is an inseparable part of an interstate transaction which must be treated as a whole. By preventing them from getting such sub-contracts, plaintiffs assert, defendants are preventing the shipment of steel into the state.

"There is no evidence showing the precise method or process of erecting steel; but it is common knowledge that it requires local labor and erecting equipment and machinery; also that each piece of fabricated steel ultimately becomes an integral part of the building.

"Under these circumstances the work of erecting steel must be regarded as merely local, and as constituting no part of an interstate transaction (General Railway Signal Co. *v.* Virginia, 246 U. S. 500, 62 L. Ed. 854; Browning *v.* Waycross, 233 U. S. 16, 58 L. Ed. 828; Kansas Steel Co. *v.* Arkansas, 269 U. S. 148, 70 L. Ed. 204); and interference with such work, by strikes or otherwise, would not amount to interference with interstate commerce.

"The facts do not bring this case within the doctrine of those decisions dealing with machines, such as a printing press or ice plant, shipped into a state in parts to be there assembled and erected by skilled labor and tested before delivery (York Manufacturing Co. *v.* Calley, 247 U. S. 21, 62 L. Ed. 963).

"Moreover, there was here no intent or purpose to interfere with interstate commerce. Defendants' ultimate object was to compel plaintiffs to submit to the closed shop policy or suffer the consequences in loss of contracts. Any reduction in the amount

> of fabricated steel shipped into the state resulting from the success of defendants' endeavors to prevent plaintiffs from getting subcontracts, would be merely an incidental injury, if any, to interstate trade. Plaintiffs' steel was not condemned as unfair. Interference with its movement was not defendants' primary aim. Consequently there was no actionable interference with interstate commerce (Bedford Cut Stone Co. *v.* Journeymen S. C. Assn., 274 U. S. 37, 71 L. Ed. 916; Industrial Assn. of San Francisco *v.* United States, 268 U. S. 64, 69 L. Ed. 54)."

On February 14, 1930, a final decree was entered (p. 96, Transcript of Record). Respondents thereupon appealed to the Circuit Court of Appeals for the Second Circuit.

Petitioners did not see fit to appeal from said part of Referee's Report and Decision, nor from the final decree overruling their exceptions thereto, which denied their claims of interference with interstate commerce.

Upon the hearing on respondents' appeal in the Circuit Court of Appeals, despite the fact that petitioners had not appealed from said portion of the Referee's Report and Decision denying them relief on the ground of an alleged violation of the Anti-Trust Laws, or from the decree overruling their exceptions thereto, petitioners briefed the point, saying:

> "The decree below may be sustained upon the ground that appellants were engaged in a conspiracy in restraint of interstate trade."

Thereafter the Circuit Court of Appeals directed a reargument upon the question as to whether:

> 1. "Is the allegation in the complaint with respect to which of the local unions named as defend-

ants, that it is a 'resident, citizen and inhabitant of the State of New York' a sufficient averment of diversity of citizenship between the plaintiffs and such local unions or its members.

2. "If there is no allegation or proof that the members of the local union named as defendants are citizens of states other than New Jersey and Pennsylvania, what judgment should this Court enter?"

The case was reargued and petitioners contended that the allegations of the bill as to diversity of citizenship were sufficient. In addition, they again injected into the argument the point at issue here, namely, that irrespective of diversity of citizenship, the Court had jurisdiction because of the charge in the bill that respondents were engaged in a conspiracy in restraint of trade and that, although the Federal question was decided adversely to plaintiffs-petitioners, the District Court did not lose jurisdiction and might proceed to final decree upon the local questions involved.

The Circuit Court of Appeals, thereafter and upon August 30, 1932 (p. 100, Transcript of Record), held that the allegations of the bill as to the residences of the unions were not sufficient and that the mere assertion by petitioners of a claim for relief upon a Federal ground, which had been determined adversely, did not give jurisdiction to the District Court to pass upon questions of which it would have no jurisdiction, except for the claim based on Federal Constitution or statute, and remanded the case to the District Court with directions (see Opinion, p. 100, Transcript of Record).

The Court, in its opinion, although not resting its decision upon the point discussed, questioned the good faith,

substantiality and colorability of petitioners asserted claim for violation of its rights under the Anti-Trust Laws.

Thereafter, upon application made, this Court granted a writ of certiorari "limited to the question of Federal Jurisdiction other than questions relating to diversity of citizenship."

POINT I.

The mere assertion by plaintiffs-appellants of a claim for relief upon a Federal ground which has been determined adversely does not give jurisdiction to the District Court to pass upon questions of which it would have no jurisdiction except for the claim based on Federal Constitution or Statute.

In considering this point, the Court will have in mind that the respondents-defendants stood upon the testimony and evidence offered by petitioners-plaintiffs in support of the alleged violation of the Anti-Trust Laws. The defendants-respondents offering no testimony on this contention. The Referee in denying relief on this ground based his finding on the insufficiency of the proof offered and not upon controverted facts.

The ruling, therefore, was not an adverse determination of a controverted fact, but an adverse legal ruling to petitioners-plaintiffs' claim that there had existed a substantial or colorful basis for their allegation in the complaint that defendants-respondents had violated the Anti-Trust Laws.

In the matters presently before the Court for its consideration in determining the questions involved, the plaintiffs-petitioners asserted two causes of action.

Primarily they assertedly invoked the jurisdiction of the Circuit Court on diversity of citizenship for the violation of certain alleged rights not founded on Federal Statute or Constitution and purely local in character. In addition, plaintiffs-petitioners alleged interference with interstate commerce with the apparent right to sue under the Federal Anti-Trust Laws. They likewise asserted a third claim based upon alleged violation of constitutional rights, which they abandoned.

The learned Circuit Court of Appeals, in denying under certain situations the claim that a jurisdiction once acquired ran to all matters of a controversy, followed this Court's opinion many times asserted in *Elgin Watch Co.* v. *Illinois Watch Co.*, 179 U. S. 665, 667, and *Leschen Rope Co.* v. *Broderick*, 201 U. S. 166, and kindred cases, rather than the ruling in *Siler* v. *Louisville & Nashville Railroad Co.*, 213 U. S. 175, at p. 191, but pointed out that its application of the *Elgin* case and *Leschen* case, *supra*, to the present situation was not to deny the doctrine laid down in the *Siler* case, but rather to harmonize the same.

Accordingly, the Court construed the *Siler* case to mean that when a Federal Court assumes to decide a local question where its jurisdiction was primarily invoked by an alleged violation of Federal Statute or Constitution the judication of the local question must be necessary to a proper determination of the Federal question involved. Continuing the Court construes the *Elgin* and *Leschen* cases to mean that where the judication of the local question is not determinative of the federal right involved and diversity of citizenship is not present and the Federal question fails, then the Court is lacking in jurisdiction to decide the local question.

In other words, there are two situations which might arise in determining the doctrine applicable to situations of this kind involving local questions.

The learned Court of Appeals found that the facts involved in the present controversy were different in jurisdictional significance than ruled upon in the *Siler* case. To say that the decision itself controverts or, in any sense, contradicts the *Siler* case is to say that the Supreme Court reversed the *Siler* case by the subsequent decisions in the *Elgin, Leschen* and similar cases.

Plaintiff-petitioners place great stress on *Vogue Co.* v. *Vogue Hat Co.*, 12 Fed. (2nd Series) 991, C. C. A. 6, and *General Investment Co.* v. *Lake Shore, etc., Railway Co.*, 260 U. S. 261, as sustaining their position.

Judge Swan, writing the opinion for the Circuit Court of Appeals in the instant case, very clearly and logically points out that his present view does not stand against the *General Investment Co.* case, *supra*, as follows:

> "In *General Investment Co.* v. *Lake Shore, etc., Railway Co.*, 260 U. S. 261, there were as here two causes of action, one, under the Anti-Trust Laws, the other, under the State law. There was federal jurisdiction over the second because of diverse citizenship. The Supreme Court did not suggest that the jurisdiction over the second rested upon that over the first. Its decision at most goes no further than that a cause of action between diverse citizens would follow into the District Court a cause of action arising under laws of the United States when the removal was upon the second ground alone. That is quite another question from the substantive jurisdiction over the second cause of action; moreover, the Supreme Court actually disposed of the second cause of action on the merits, while dismissing the

first for lack of jurisdiction. Obviously, therefore, however the second got into the District Court, the power to adjudicate upon it could not be ancillary to jurisdiction over the first. Judge Denison, anticipating his view expressed in *Vogue Co.* v. *Vogue Hat Co., supra,* did invoke the *Siler* case, but even then as a *dictum* because he thought that federal jurisdiction existed quite independently (269 F. 235, 241), just as the Supreme Court did. The case does not, therefore, stand against our view. It is confirmed, moreover, by the language of Mr. Justice Holmes in *Stark Bros. Co.* v. *Stark,* 255 U. S. 50, 51." (See Judge Swan's opinion, pp. 106, 107, Transcript of Record).

Accordingly, petitioners must rest on the doctrine laid down in *Vogue Co.* v. *Vogue Hat Co.,* 12 Fed. (2nd Series) 991, C. C. A. 6. It is respondent's contention that irrespective of how the abstract proposition of law involved here is determined, petitioners do not meet the first requirement of that case and, therefore, cannot sustain their position in any event.

The doctrine laid down in the *Vogue* case, *supra,* by Judge Denison requires the determination of the validity of the trade mark before the Court would have jurisdiction to decide the local question involved, namely, unfair competition. This requirement goes beyond the mere assertion in the pleadings of the validity of a trade mark and of necessity requires submission of proof thereunder in order to determine the actual fact.

This being so, the *Vogue Co.* case, *supra,* is an authority for consideration of the matters involved here rather than in conflict with Judge Swan's opinion; otherwise, the mere assertion of the validity of the trade mark would give juris-

diction no matter whether it was subsequently decided that the trade mark was invalid. To determine the validity of a trade mark necessitates a submission of proof sustaining the claim as was done in this case when the Referee after hearing the uncontroverted testimony of petitioners-plaintiffs on the alleged violation of interstate commerce ruled, as a matter of law, that the proof was insufficient to sustain the charge.

It is not our conception of the law that an adroit pleader can so frame his bill as to make it impregnable against demur for insufficiency and then when the charge is heard appears unsubstantial in every respect that a Federal Court can then inquire into a purely local question by virtue of a jurisdiction flowing through the claim, which has been adversely decided against the complainant upon their own evidence; the defendants having offered no evidence whatever upon said contention. If this were so jurisdiction could be conferred by the pleader upon himself making nugatory the laws and statutes governing the same.

That this effort was made in the instant case cannot be denied, as relief was first sought for under State jurisdiction with a number of parties made plaintiffs, whose residences and citizenships were stated to be the same as several of the defendants and defendant associations named.

In the instant case, the preliminary injunction sought for was denied in the State Court. Subsequently, the identical bill, in substance, was filed in the Southern District of New York, eliminating those plaintiffs who, on the face of the complaint in the State Court, had the same residence and citizenship of the several defendants herein (as alleged in paragraph 19, defendants' answer, p. 31, Transcript of Record), and including the additional charge of

boycott so that petitioners-plaintiffs could apparently invoke the jurisdiction of the Circuit Court on grounds of diversity of citizenship and under the Anti-Trust Laws.

It must be conceded under the circumstances since petitioners failed to appeal from the denial of relief under the Anti-Trust Laws, and particularly the urgency with which they stressed their claim of diversity of citizenship when challenged not only in the Circuit Court of Appeals, but likewise in their application for certiorari to this court, that that was their substantial claim for jurisdiction and not until such time as that particular phase of the jurisdiction was denied them did they seriously employ the devious attempt to apply the *Vogue Co.* case, *supra,* to the present situation.

Accordingly, even if the *Vogue Co.* case, *supra,* is concluded to be determinative of the abstract principles of law involved here, it still fails to sustain the position of petitioners. To hold that it does would necessitate the rejection of the first and vital requirement of the doctrine laid down by Judge Denison in that case, namely, the determination of the validity of the trade mark. That requirement as applied to the situation in controversy was met by the determination of the Referee in denying as a matter of law the relief sought under the Anti-Trust Laws and, in accordance with the *Vogue Co.* case, closed that door as a medium of jurisdiction to decide the purely local question involved.

The *Vogue Co.* case, *supra,* as applied to our situation merely follows the long established doctrine as laid down in *Minnesota* v. *Northern Security Co.,* 194 U. S. 48, 24 S. Ct. Rep. 598, 48 L. Ed. 870, as cited in *Noyes* v. *Parsons,* 245 Fed., at page 694:

> " 'An allegation in a complaint filed in a Circuit Court of the United States may, indeed, in a sense confer jurisdiction to determine whether the case is of the class of which the court may properly take cognizance for purposes of a final decree on the merits. Newburyport Water Co. *v.* Newburyport, 193 U. S. 561, 24 Sup. Ct. 553, 48 L. Ed. 795, and Pacific Electric Ry. Co. *v.* Los Angeles, 194 U. S. 112, 24 Sup. St. 586, 48 L. Ed. 896, decided at present term. But if, notwithstanding such an allegation, the court finds, at any time, that the case does not really and substantially involve a dispute or controversy within its jurisdiction, then, by the express command of the act of 1875, its duty is to proceed no further'—citing section 5 of the act of 1875 (Act March 3, 1875, c. 137, 18 Stat. 472 (Comp. Stat. 1916, Sec. 1019)."

This holds that of necessity an allegation might confer in a sense limited jurisdiction to determine the substantiality (validity as in *Vogue* case) of the claim, and once it arrives at an adverse determination its jurisdiction ceases for all purposes in connection therewith, as though the allegation had never been made.

This being true and the claim of diversity of citizenship having been eliminated from the case, the Court properly ruled it had no jurisdiction to sustain the United States Circuit Court's disposition of the local question involved.

POINT II.

Irrespective of the determination of the questions raised under Point I, there are other considerations inseparably related to the question raised thereunder, which lead to the same determination made by the Circuit Court of Appeals in connection therewith and on account of which its said decree should not be disturbed.

A. The alleged claim of Federal Jurisdiction must be substantial and not frivolous.

(Minnesota *v.* Northern Security Co., 194 U. S. 48, 24 S. Ct. Rep. 598, 48 L. Ed. 870.)

It needs no citation of authority at length to sustain this familiar doctrine. Respondents submit that a consideration by the Court of the circumstances surrounding the inception of this litigation in the State Court, to its presence here, including the actions of petitioners before and after the Referee's denial of relief under the Anti-Trust Laws, and likewise the statements by Judge Swan in his opinion questioning the substantiality of their claim thereunder, can lead but to the conclusion that their claim bottomed on a violation of the Anti-Trust Laws was unsubstantial in every respect and used as a "makeweight" in their effort to submit to Federal jurisdiction.

Their additional claim for jurisdiction, namely, under the Constitution and Laws of the United States, is only additional evidence of their effort to conform to the requirements of Federal jurisdiction, which ground was confessedly unsubstantial by their abandonment of the same,

despite the fact that they originally asserted it with the same apparent seriousness and effect as the other two grounds upon which they claimed jurisdiction.

Respondents cannot agree with the statements throughout petitioners' brief that the Court did not hold the claims of petitioners under the Anti-Trust Laws were frivolous.

It is true that the Court did not rest its decision upon the particular question, but a great portion of the decision rendered by the Court discussed that very proposition and in no uncertain terms or significance.

Excerpts from the Court's opinion clearly indicate that belief:

> "There is neither allegation nor proof that the activities of the defendants were in any way motivated by a desire to restrain interstate trade of the plaintiffs" (See p. 103, Transcript of Record).
>
> "Even less can be said in support of the contention that constitutional rights of the plaintiffs were violated; indeed, this point was not even briefed upon this appeal" (See p. 104, Transcript of Record).
>
> "* * * ; and secondarily, and almost as a makeweight, they alleged interference with interstate commerce and apparently assert a right to sue under the Federal Anti-Trust Statutes. The additional claim of a violation of constitutional rights is so unsubstantial that no further mention of it is required" (See p. 107, Transcript of Record).
>
> "There is another consideration which might be urged as leading to the same result even if the *Siler* rule was held applicable. Concededly the alleged claim of federal jurisdiction must be substantial and not frivolous. *Minnesota* v. *Nor. Securities Co.*, 194 U. S. 48. In other words, a plaintiff may not base a claim for relief upon a federal ground which has

been authoritatively decided against him, and still demand that the Court pass upon other questions of which it would have no jurisdiction except for the claim based on federal constitution or statute. See *Bianchi* v. *Morales*, 262 U. S. 170, 172; *Niles-Bement-Pond Co.* v. *Iron Moulders Union*, 254 U. S. 77, 82; *Colonial Drug and Sales Co.* v. *Western Products Co.*, 54 F. (2nd) 216, 219 (C. C. A. 10); *Wallace Ranch Water Co.* v. *Rd. Commission*, 47 F. (2nd) 810 (C. C. A. 9); *Postal Tel. Cable Co.* v. *Nolan*, 240 F. 754, (D. Mont.); *Silvey* v. *Commissioners*, 273 F. 202, 207 (S. D. Ohio). It may well be doubted whether the plaintiffs' claim under the anti-trust laws could be deemed substantial. They urge that their bill was filed in March, 1925, and that the situation must be looked at as of the time rather than in the light of subsequent decisions. See *Boston Store* v. *Am. Graphophone Co.*, 246 U. S. 8, 26; *Mich. Central R. R. Co.* v. *Vreeland*, 227 U. S. 59, 63. We are inclined to believe that the question could not properly be thought doubtful even when the bill was filed, for the effect of an indirect incidental and remote interference with interstate commerce such as that alleged in the case at bar had already been considered in *United Mine Workers* v. *Coronado Co.*, 259 U. S. 344, 410, and *United Leather Workers* v. *Herkert*, 265 U. S. 457, as was pointed out in the *Industrial Association* case, 268 U. S. 64, 80; but we do not decide this point nor rest our decision upon it'' (pp. 107, 108, Transcript of Record).

Taking the above excerpts from the Court's opinion on the substantiality of the claim, together with the fact that petitioners' first sought relief in the State Court and failing there invoked the jurisdiction of the Federal Court, alleging three grounds:

A. Diversity of citizenship, which has been eliminated from consideration;

B. Violation of the Anti-Trust Laws, which was denied them on the basis of uncontroverted facts, as a matter of law;

C. On constitutional grounds, which they abandoned; is conclusive of the fact not only that their claims of jurisdiction, and particularly the one under question, was unsubstantial, but they obviously attempted to conform to the jurisdictional requirements of the Federal Court, rather than asserting *bona fide* and substantial jurisdictional claims thereunder.

Despite petitioners' contention now that the jurisdictional claim under the Anti-Trust Laws was substantial the most significant fact as indicating petitioners' own opinion as to the worth and substantiality of this claim was their failure to appeal when relief under it was denied, as a matter of law.

Accordingly, because of the foregoing, the Decree of the Circuit Court of Appeals should not be disturbed.

(B) In disposing of this matter the Court should likewise keep in mind the amendment to the Labor Law, namely, Public Act No. 65, approved March 23, 1932, and set forth thereunder as Chapter 6, Title 29, Sections 101 to 115 inclusive, U. S. C. A.

It is apparent from a reading of the present law that the restraint against the respondents in the present situation can no longer stand.

The acts upon which said restraint is predicated are declared to be legal acts within the meaning of the statute

and it expressly prohibits Federal Courts from issuing injunctions in similar cases declaring such action to be against the public policy of the United States.

As a consequence the questions involved herein are moot.

CONCLUSION.

It is respectfully submitted that the Circuit Court of Appeals for the Second Circuit did not err in holding that the District Court had no jurisdiction to make the decree which it did, and that the decree of the United States Circuit Court should be affirmed.

Respectfully submitted,

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